SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 712

EARLE E. KYNETTE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF

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The record produced by petitioner in support of his petition herein consists of excerpts taken from the record in the court below and printed by petitioner without stipulation by respondent as to what the record should contain. Further, the said record does not present any reason why the writ should be granted. No Federal question was decided by the State court.

QUESTIONS PRESENTED BY PETITION

I

"The ruling of the State Supreme Court approving the use at the trial as evidence your petitioner's prior claim of privilege against self-incrimination when petitioner appeared before the grand jury that indicted him, destroyed the guarantee contained in the provision of the State Constitution that no person shall be compelled to be a witness against himself in any criminal case, thereby denying to your petitioner equal protection under the laws of the State of California because the Supreme Court of the State of California construed this petitioner's assertion of his constitutional right as evidence, and further declared it to be evidence that could properly be used to impeach and discredit the petitioner's testimony given on his own behalf at the trial. That your petitioner was by the decision of the Supreme Court denied in a criminal case a right that has been by the Constitution of this State freely granted to all persons within this jurisdiction."

II

"That the official representative of the State of California, the district attorney, falsely represented to your petitioner at the time your petitioner appeared as a witness in response to a subpena before the grand jury. That said petitioner was invested with a right under the provisions of the

Constitution of the United States to assert a privilege against self-incrimination, and that the said district attorney wrongfully informed this petitioner that under the Constitution of the United States, your petitioner was not required to testify before the Los Angeles County grand jury on any subject that might involve petitioner in the commission of any crime." (Pet., pp. 7, 8.)

STATEMENT OF CASE

Petitioner was convicted of attempted murder, assault with intent to commit murder, and malicious use of explosives, as charged in counts 2, 3 and 4 of the indictment. He was acquitted of conspiracy to commit murder as charged in count 1. (R., 9, 10.) The convictions were affirmed by the Supreme Court of California. (*People* vs. *Kynette*, 15 Cal. (2d) 731; 104 P. (2d) 794.)

STATEMENT OF FACTS

The facts in the case, as set forth in the decision of the Supreme Court of California, are as follows: (R., 29-37.)

> "It appears from the evidence that for some time prior to the commission of these offenses there existed in the police department of the city of Los Angeles an organization known as the Special Intelligence Unit, which had its headquarters separated from the rest of the department. For approximately two years, Kynette, a police officer, was in charge of this special unit as acting captain. Allen, also a police officer,

likewise had been a member of this special unit for some time. Throughout the trial and upon these appeals, the prosecution has repeatedly asserted that the membership of this special unit, consisting of some eighteen or twenty men, was largely engaged in setting dictaphones, spying upon, 'tailing' and in general conducting an extensive espionage of persons who might engage in any political activities opposed to the interests of the then incumbent city administration.

"On January 14, 1938, one Harry Raymond, who was then being subjected to surveillance by this special intelligence unit, was almost fatally injured as a result of an explosion which occurred when he pressed the starter button on his automobile, in the garage of his home. It appears that Raymond had much to do with both the appointment and subsequent resignation of one Harry Munson as a police commissioner of the city of Los Angeles under the administration that assertedly employed the intelligence unit of the police department for its political protection. Munson had become indebted to one Ralph Gray for campaign work and the latter upon nonpayment procured a judgment therefor. Gray was attempting to collect the money and satisfy the judgment while Munson claimed to be without financial resources to discharge it. On June 17, 1937, a hearing was scheduled on an order to examine into Munson's financial status. Raymond, friend of the judgment creditor Gray and then enemy of the debtor Munson, was thought to possess certain information as to the latter's finances which would 'put the heat' on the administration and 'blow the lid off the city hall.'

Raymond attended the hearing, as did Kynette, then acting captain of the intelligence unit of the police department. Kynette inquired of Raymond as to the nature of the matter and was invited by the latter to take a seat and listen to the court proceedings. However, the hearing was postponed and all persons left the hearing room in the Hall of Records. When on the sidewalk Kynette, according to Raymond's testimony, came over to him and after an exchange of preliminary remarks stated: 'this thing has got to stop. You can't turn any heat on the administration. * * * There is nothing going to happen to Munson. * * * Now, if there is any further trouble or any further bothering of Munson, you know I am the head of the intelligence squad. * * * I hope you don't try to get too tough, because you remember what happened to that little boy Red Foster.' The evidence showed that 'Red' Foster had been 'bombed out in his room.' When on the stand in his own defense, Kynette admitted attending the Munson hearing and corroborated Raymond as to the substance of their conversation in the court room. He also admitted having a later conversation on the sidewalk but denied that the substance thereof was as related by Raymond.

"Almost immediately thereafter Kynette, with the aid of certain members of his intelligence squad, set up an espionage upon Raymond. At the direction of Kynette a 'spy house' was rented by one of the members of the squad acting under an assumed name. This house was in the immediate neighborhood of Raymond's home and commanded a view thereof. It was obtained for the

purpose of installing a dictaphone in Raymond's home and to observe his every move. Practically every activity of Raymond from the time he arose in the morning until he retired at night was under the surveillance of members of the intelligence squad detailed in shifts to the 'spy house' or engaged in 'tailing' him as he moved about the city. Allen was assigned to the 'spy house' in October, 1937, and did his share toward covering every move of Raymond. In January, 1938, Kynette stated to a witness that he was tracing Raymond's career in an effort to ascertain why he was giving information to the civic committee, and stated that Raymond was giving false information as to vice establishments in order to collect money from the city administration. On occasions Kynette and Allen were observed examining Raymond's parked automobile. In December, 1937, a man resembling Kynette was observed by Mrs. Raymond in the middle of the night examining the door of their garage with the aid of a flashlight. Raymond testified that as he passed Kynette and some other men on the street early in January, 1938, Kynette declared that 'it won't be long until I take care of him.' A foundryman having his place of business in the city of Los Angeles testified that early in January, 1938, Kynette, accompanied by a tall man, came to his foundry and inquiry was made by them about pipe or tubing stating that they wanted 'something thin that will break easy in small pieces.' They were directed elsewhere by the witness. On the night of January 13th and until approximately four o'clock in the morning of January 14, 1938, the

neighbors testified that there was considerable activity in the 'spy house.' The witness Sakalis, a fruit and vegetable peddler who lived across the alley from the 'spy house,' testified that he was awakened by three men who were talking in the alley and who immediately went into the 'spy house' after the witness remonstrated with them. His wife testified that she later heard footsteps going down the alley from the 'spy house' toward Raymond's home and in about one-half hour heard return footsteps. Apparently this was the only night that there had been such late activities at the 'spy house' for the neighbors had not previously heard the occupants. Allen admitted being on duty there with the acquitted officer Browne on that night. Allen claims, however, to have left the 'spy house' at about 11 P. M.—a matter which the jury undoubtedly considered and determined in the light of all the evidence.

"On the morning following this unusual activity at the 'spy house,' the explosion of a bomb occurred when Raymond pressed the starter button of his automobile. Fragments of iron pipe and wire were found in the vicinity of the car and garage after the bombing. Experts who had studied these fragments concluded that the bomb used was 'a three-inch malleable wrought iron pipe with a cast iron cap at each end, the pipe of unknown length.' Here, it should be recalled that a foundryman testified. that Kynette and another man had previously inquired about piping that would 'break easy in small pieces.' Under the routine theretofore followed at the 'spy house' when Allen and his partner

left the house on the night preceding the bombing, they would normally reopen the house and resume their surveillance of Raymond the following morning. Instead they did not return the following or any other day, and such espionage as was thereafter carried on from the house was done by other members of the unit who apparently did not know what had happened. Sakalis, the vegetable peddler who had remonstrated with three men for their activity in the alley late on the night preceding the bombing, also testified that a few mornings thereafter while proceeding on his vegetable route he was followed into the hills in back of Glendale by two men in an automobile who stopped him, dragged him from his truck, beat him and told him to keep his mouth shut as to what he knew concerning the Raymond bombing. Sakalis definitely identified these men as Kynette and Allen and referred to them as his 'neighbors' in the 'spy house.' The jury might reasonably infer that the only persons who would have any interest in silencing Sakalis as to any knowledge he might possess pertinent to the bombing would be the participants therein. As stated, Sakalis was assaulted in the morning. Later that same day Allen left the city for a mountain resort. Although while there he had been in telephonic communication with Kynette and had been informed that he was wanted by the police and the district attorney, he remained away for several days. He attempted to explain his absence as a vacation. It is significant that while the homicide squad of the police department was exerting every effort to solve the

bombing outrage and track down the perpetrators thereof, the members of the intelligence unit, including Kynette as acting captain thereof, failed to disclose that for months they had had the victim thereof under constant surveillance and were familiar with the movement of all persons and vehicles in an about the Raymond home, which information, if disclosed, conceivably might have been of assistance in the solution of the crime. The prior espionage of Raymond by the intelligence unit came to light as a result of the efforts of the homicide squad. In view of this the jury may well have reasoned that innocent men, occupying positions as police officers, would not have remained silent but would have come forward and immediately advanced all of their information in the hope of apprehending the offenders.

"While a suspect, Kynette, in response to inquiry by members of the homicide squad as to his whereabouts on the night preceding the explosion stated that until 10 o'clock he had been at a reserve officers' meeting and that thereafter he 'was on a secret mission' for the mayor, the nature of which mission he would not divulge. Upon the trial, he testified to attending a reserve officers' meeting in the early evening (and in this he was corroborated by others there attending) and that from the meeting he went to his office for a brief period before retiring to his home where he assertedly arrived at approximately 11:45 o'clock. Contrary to Kynette's original testimony on the point, it appears from testimony of telephone company employees that on the night following the day

of the bombing he made two or three unsuccessful efforts to telephone to the brother of the then mayor who was in Mexico City and from whom he assertedly received his orders as head of the intelligence unit. Failing to make the desired connection he spoke with the then chief of police, also in Mexico City. The purpose of such a call and any inconsistencies in the testimony of Kynette with respect thereto were matters for the jury to consider. Among other things, the witness Gray, whom the victim Raymond prior to his injuries was attempting to assist in collecting an indebtedness from the ex-police commissioner Munson, testified that while he was visiting with Raymond at the hospital on the day following the bombing he received a telephone call from a person whose voice he recognized as Kynette's, and that the caller, after learning that the victim Raymond was 'resting better' declared 'That's too bad. Next time we will do a better job. You're next, Mr. Gray, maybe tomorrow, next day or next week, but we will get around to you and we will do a better job on you than we did on Mr. Raymond.' The audacity of such a statement is appalling, but the jury may well have concluded that the author thereof, deeming himself secure in his political entrenchment, felt safe in making these threats.

"During a search of Kynette's home by member of the homicide squad and the police chemist, certain wire was found by the latter on the work bench in the garage. It was found to consist of two strands, one white covered and the other black covered, of California Cap Company

detonator leg wire, a type of wire produced only by the named company and attached to and constituting leg wires for electric detonators. Such wire is not readily avaliable on the market. As stated earlier, fragments of wire and other substances had been picked up by investigators at the scene of the bombing. Experts segregated and examined these fragments and among them found what was determined to be both white and black covered California Cap Company detonator leg wire, similar to that found in appellant Kynette's garage. There was evidence as to gauge, insulation wrappings, enamel color of insulation, lengths of wires, etc., from which the jury might infer that the wire found in Kynette's garage represented the unused portions of the detonator leg wire employed in the Raymond bomb. The testimony of prosecution experts would support such inference. The opinions of these experts were also based, among other things, upon the similarity as to the quantity of impurity in the copper of the black covered wires found in Kynette's garage and at the scene of the explosion and of the similarity of impurity in the white covered wires found at each place, though singularly enough the black and white wires regardless of where found were not similar in quantity or impurity. The prosecution experts testified that there was no substantial dissimilarity between the wires found at the scene of the bombing and those found in Kynette's garage."

GRAND JURY

Petitioner Kynette appeared before the grand jury on February 18, 1938, at about 10.00 o'clock a.m., the day the indictment was returned (R., 8, 12, 17), and testified that he was an active captain of the police department of the City of Los Angeles and had been on the police force between thirteen and fourteen years; that he knew his constitutional rights; that he knew he was not required under the Constitution to testify to any fact which in his opinion would tend to incriminate or involve him in the commission of any crime, and that he had nothing further to say and desired to stand upon his constitutional rights. (R., 17-19.)

TRIAL

At the trial petitioner Kynette took the witness stand in his own defense and related an exculpatory story in which he denied any and all criminal activity at the "spy house" and disclaimed any knowledge of or participation in the Raymond bombing. (R., 45.) For the purpose of impeachment, the prosecution on re-crossexamination of petitioner, over petitioner's objection that the matter was improper crossexamination, incompetent and not proper as to any impeachment whatsoever, brought out the fact that petitioner when before the grand jury refused to testify and stood on his constitutional rights. (R., 17-19.)

HOLDING BY SUPREME COURT

The ruling of the trial court in permitting this evidence was one of the errors assigned on petitioner's appeal. The Supreme Court of California held that the trial court in its subsequent instructions carefully stated that such evidence was not generally admitted as having any bearing on the question of guilt or innocence of the appellants, but was admitted for the limited purpose of impeachment and as evidence going to the credibility of the appellants as witnesses upon the trial, and found no error in the ruling or the instructions, and that the effect was not, as asserted, to destroy the constitutional privilege afforded appellants of answering as they did before the grand jury. (R., 45.)

I

NO FEDERAL QUESTION WAS DECIDED BY THE STATE COURT

Neither in his petition nor brief does petitioner contend that he was denied any right guaranteed by the Constitution of the United States. The force of his argument is that the effect of the constitutional privilege against self-incrimination was destroyed by the decision of the State court in holding that where an accused at his trial takes the witness stand in his own behalf and relates a story exculpating himself from all knowledge of or participation in the crime charged, his testimony may

be impeached by evidence showing that on a previous occasion he refused to testify to any fact which in his opinion would tend to incriminate or involve him in the commission of any crime. This holding by the Supreme Court of California does not decide nor involve a Federal question. It merely involves and decides applicable rules of State procedure.

Amendment V of the Constitution of the United States provides that, "No person * * * shall be compelled in any criminal case to be a witness against himself, * * *."

In *Brown* vs. *New Jersey*, 175 U. S. 172, 174, 175 (44 L. Ed. 119), it is said:

> "The first ten amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on Federal Government. (citing authorities)
>
> "The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. (citing authorities) 'The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding.' (citing authority)."

In *Erie R. Co.* vs. *Thompkins,* 304 U. S. 64, 58 S. Ct. 817, 822, the Court said:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

In *Jack* vs. *Kansas,* 199 U. S. 372, the plaintiff in error sought to have this Honorable Court review the judgment of the Supreme Court of the State of Kansas, affirming a judgment against him of imprisonment for contempt, entered by direction of the district court of Shawnee County, in that State. The plaintiff in error had been duly subpenaed as a witness to appear before the above-mentioned district court and was examined before that court under and by virtue of the provisions of Section 10 of Chapter 265 of the laws of Kansas of 1897. The Supreme Court of Kansas had held that the statute under which the plaintiff in error was sentenced to be imprisoned for a contempt of court was a valid statute, and did not violate either the constitution of the State or of the Federal Government. This Honorable Court said: (p. 379.)

> "It is contended on the part of the plaintiff in error that the court below denied to him the protection of Section 10 of the bill of rights of the constitution of Kansas, and also denied to

him the benefit of the provision of the Fifth Amendment to the Constitution of the United States, that no person should be compelled, in any criminal case, to be a witness against himself, and also that he has been deprived of the benefit of the Fourteenth Amendment. We are bound by the decision of the Supreme Court of Kansas that the statute in question violated no provision of the constitution of that State, and that it was a valid statute so far as that instrument was concerned. This doctrine is familiar, and a few of the many cases upon the subject are cited in *Smiley* vs. *Kansas,* 196 U. S. *supra.*

"It has been so frequently held, as not to warrant the citation of many authorities, that the first ten amendments to the Federal Constitution operate on the National Government only, and were not intended to, and did not, limit the powers of the States in respect to their own people. *Spies* vs. *Illinois,* 123 U. S. 131; *Brown* vs. *New Jersey,* 175 U. S. 172, 174. That portion of the Fifth Amendment, therefore, already cited, has no application in a proceeding like this, in a state court, under a state statute.

* * * * * * *

"We are of the opinion that no Federal right of the plaintiff in error has been violated, and the judgment of the Supreme Court of Kansas must, therefore, be affirmed."

See, also, *Hale* vs. *Henkel,* 201 U. S. 43, 68, 69.

II

NO MERIT TO PETITIONER'S CLAIM EVEN IN FEDERAL PROSECUTIONS

In *Raffel* vs. *United States,* 271 U. S. 494, 46 S. Ct. 566, Raffel, with another, was indicted and tried for conspiracy to violate the National Prohibition Act. Upon the first trial a prohibition agent testified that after the search of a drinking place, Raffel admitted that the place belonged to him. On that trial Raffel did not offer himself as a witness, and the jury failed to reach a verdict. Upon the second trial the prohibition agent gave similar testimony. Raffel took the stand and denied making any such statement. After admitting that he was present at the former trial, and that the same prosecuting witness had then given the same testimony, Raffel was asked questions by the court which required him to disclose that he had not testified at the first trial, and to explain why he had not done so. The second trial resulted in a conviction. On writ of error, the Circuit Court of Appeals for the Sixth Circuit certified to this Honorable Court a question necessary to the disposition of the case as follows:

> "Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial?"

The Court, after setting forth and discussing the Fifth Amendment, said: (p. 568)

"It is elementary that a witness, who upon direct examination denies making statements relevant to the issue, may be cross-examined with respect to conduct on his part inconsistent with this denial. The value of such testimony, as is always the case with cross-examination, must depend upon the nature of the answers elicited, and their weight is for the jury. But we cannot say that such questions are improper cross-examination, although the trial judge might appropriately instruct the jury that the failure of the defendant to take the stand in his own behalf is not in itself to be taken as an admission of the truth of the testimony which he did not deny.

"There can be no basis, then, for excluding the testimony objected to, unless it be on the theory that, under the peculiar circumstances of the case, the defendant's immunity should be held to survive his appearance as a witness on the second trial, to the extent, at least, that he may be permitted to preserve silence as to his conduct on the first.

"Whether there should be such a qualification of the rule that the accused waives his privilege completely by becoming a witness must necessarily depend upon the reasons underlying the policy of the immunity, and one's view as to whether it should be extended. The only suggested basis for such a qualification is that the adoption of the rule contended for by the government might operate to bring pressure on the accused to take the stand on the first trial, for fear of the consequences of his silence in the event of a second trial, and might influence the

defendant to continue his silence on the second trial, because his first silence may there be made to count against him. See *People* v. *Prevost, supra,* 247 (189 N. W. 92); 36 Harvard Law Rev. 207, 208.

"But these refinements are without real substance. We need not close our eyes to the fact that every person accused of crime is under some pressure to testify, lest the jury, despite carefully framed instructions, draw an unfavorable inference from his silence. See *State* v. *Bartlett,* 55 Me. 200, 219; *State* v. *Cleaves,* 59 Me. 298, 300, 8 Am. Rep. 422. When he does take the stand, he is under the same pressure: To testify fully, rather than avail himself of a partial immunity. And the accused at the second trial may well doubt whether the advantage lies with partial silence or with complete silence. Even if, on his first trial, he were to weigh the consequences of his failure to testify then, in the light of what might occur on a second trial, it would require delicate balances to enable him to say that the rule of partial immunity would make his burden less onerous than the rule that he may remain silent, or, at his option, testify fully, explaining his previous silence. We are unable to see that the rule that if he testifies, he must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not.

"The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf, and not for those who do. There is a sound policy in

requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial, or to any tribunal, other than that in which the defendant preserves it by refusing to testify.

"The answer to the question certified is 'No'."

In *Tomlinson* vs. *United States,* 93 Fed. (2d) 652, appellants were convicted in the district court under an indictment charging them and Charles Henry Bass with the crime of robbery. Appellant Tomlinson contended that counsel for the Government was guilty of misconduct in commenting upon his failure to testify before the grand jury, and the Court said:

"Even though the facts were as appellant contends, his conclusion would not follow."

In support of this statement the Court cited and quoted *Raffel* vs. *United States, supra.*

In *United States* vs. *Buckner,* 108 Fed. (2d) 921, William P. Buckner, Jr., and William J. Gillespie were convicted of using the mails to defraud. In that case the Court said: (p. 927.)

"The second ruling concerns Buckner's refusal to testify before the Securities and Exchange Commission. At the trial Buckner declared on cross-examination that there was nothing 'wrong' with the tipster profit-sharing scheme he had arranged with the speculator Breen. The prosecutor was permitted to bring

out that at the S. E. C. hearing Buckner had been questioned about this same scheme, and had refused to answer, claiming his privilege. Buckner was then asked at the trial to explain why he claimed his privilege before the S. E. C., if there was nothing wrong with the Breen deal. This was not improper."

The Court, in support of said statement, cited and quoted *Raffel* vs. *United States, supra.*

CONCLUSION

From the foregoing it clearly appears that no Federal question was decided by the State court, and that even in a Federal prosecution, petitioner's asserted claim of error would be without merit. In fact the Federal decisions hereinabove cited extend the rule much farther than the Supreme Court of California applied it in the instant case. The conduct of the prosecutor in a Federal court was held not improper even though the accused was asked on cross-examination to explain why he claimed his privilege before a Federal commission if there was nothing wrong with his acts for which he was then being prosecuted.

In the instant case, the trial court carefully stated that such evidence was not generally admitted as having any bearing on the question of the guilt or innocence of the appellants, but was admitted for the limited purpose of impeachment and as evidence going to the credibility of the appellants as witnesses on the trial. This ruling by the

Supreme Court of California is in consonance with the holding by this Honorable Court in the case of *Raffel* vs. *United States, supra.*

Therefore, the petition herein should be denied.

Respectfully submitted.

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